88-1445

Supreme Court, U.S.
FILED
MAR 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals committed an error, increasingly common among courts of appeals, by deferring to the statutory interpretation of an administrative agency without first completing the mandatory first step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires a court to use traditional tools of statutory construction to attempt to discern Congress' intent before it considers the administrative interpretation.

PARTIES BELOW

Petitioners In All Cases

National Association of Casualty and Surety Agents
National Association of Life Underwriters
National Association of Professional Insurance Agents
National Association of Surety Bond Producers

Petitioners In 87-1355

Maryland Association of Life Underwriters
PIA Association of Pennsylvania, Maryland and Delaware, Inc.

Petitioner In 88-1001, 88-1206, 88-1270, 87-1644, 87-1686 and 87-1801

Independent Insurance Agents of America, Inc.

Respondent In All Cases

Board of Governors of the Federal Reserve Board

Intervenors

No. 87-1354—MNC Financial, Inc.
No. 87-1355—Sovran Financial Corporation
No. 88-1206—First Fidelity Bancorporation
No. 87-1644—Trustcorp, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTE	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS' DECISION MISAPPREHENDS AND MISAPPLIES THE PRINCIPLES FOR REVIEW OF AGENCY ACTION SET FORTH IN *CHEVRON v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*, *INS v. CARDOZA-FONSECA* AND *NLRB v. UNITED FOOD & COMMERCIAL WORKERS UNION*	7
II. FEDERAL COURT DECISIONS DEMONSTRATE CONFUSION CONCERNING THE APPROPRIATE POINT AT WHICH TO DEFER TO AN AGENCY'S INTERPRETATION OF A STATUTE	12
III. THE PROPER STANDARD OF REVIEW OF AGENCY ACTION IS AN IMPORTANT FEDERAL QUESTION AFFECTING ALL JURISDICTIONS	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases Page

Bethesda Hospital Ass'n v. Bowen, 108 S. Ct. 1255 (1988) 10
Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986) 8
Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 9
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 9
Diamond Shamrock Exploration Corp. v. Hodel, 853 F.2d 1159 (5th Cir. 1988) 13
ETSI Pipeline Project v. Missouri, 108 S. Ct. 805 (1988) 11
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 5, 6, 14, 15
Lehman v. Burnley, No. 88-6020 (2d Cir. Jan. 13, 1989) 12
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 14
Mesa Verde Construction Co. v. Northern California District Council of Laborers, 861 F.2d 1124 (9th Cir. 1988) 14
NLRB v. United Food & Commercial Workers Union, 108 S. Ct. 413 (1987) 7, 12, 15
Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988) 11
Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, 856 F.2d 546 (3d Cir. 1988) 12
Regents of University of California v. Public Employment Relations Board, 108 S. Ct. 1404 (1988) 11
SEC v. Sloan, 436 U.S. 103 (1978) 14
United States v. James, 478 U.S. 597 (1986) 7, 8
Volkswagenwerk v. Federal Maritime Comm'n, 390 U.S. 261 (1968) 14
Young v. Community Nutrition Institute, 476 U.S. 974 (1986) 11

TABLE OF AUTHORITIES—Continued

Statutes

	Page
28 U.S.C. § 1254(1)	2
Section 4 of the Bank Holding Company Act, 12 U.S.C. § 1843	2, 6
Section 9 of the Bank Holding Company Act, 12 U.S.C. § 1848	4
Exemption D of Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8)(D)	*passim*
12 U.S.C. § 24 (Seventh)	6

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OPINIONS BELOW

The decision of the court of appeals in Nos. 87-1354 and 87-1355 is reported at 856 F.2d 282. It appears as Appendix I, pp. 1a-23a, *infra*. A concurrence in the denial of rehearing *en banc* in Nos. 87-1354 and 87-1355 is reported at 862 F.2d 351. It appears as Appendix VI, pp. 54a-59a, *infra*. The opinion of the Board of Governors of the Federal Reserve System ("Board") in No. 87-1354 is reported at 73 Federal Reserve Bulletin 740 (1987). It appears as Appendix IV, pp. 46a-52a, *infra*. The opinion of the Board in No. 87-1355 is reported at 73 Federal Reserve Bulletin 672 (1987). It appears as

Appendix III, pp. 26a-45a, *infra*. The decision of the court of appeals in Nos. 88-1001, 88-1206, 88-1270, 87-1644, 87-1686 and 87-1801 is unreported. It appears as Appendix II, pp. 24a-25a, *infra*.[1]

JURISDICTION

The opinion of the court of appeals in Nos. 87-1354 and 87-1355 was filed on September 9, 1988. A timely petition for rehearing and suggestion for rehearing *en banc* was filed by petitioners. The petition for rehearing was denied on December 2, 1988. Appendix V, p. 53a, *infra*. The suggestion for rehearing *en banc* was denied, with two Circuit Judges concurring, on December 2, 1988, and is reported at 862 F.2d 351. It appears as Appendix VI, pp. 54a-59a, *infra*. The order of the court of appeals in Nos. 88-1001, 88-1206, 88-1270, 87-1644, 87-1686 and 87-1801 was filed on January 19, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTE

The following portions of Section 4 of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1843, are relevant to this case:

> (a) [N]o bank holding company shall—
>
> (1) . . . acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or
>
> (2) . . . retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than . . . (B) those permitted under paragraph (8) of subsection (c) of this section . . . .

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[1] The decisions of the Board in Nos. 88-1001, 88-1206, 88-1270, 87-1644, 87-1686 and 87-1801, which simply relied on the Board's previous ruling that appears as Appendix III, have not been included in the Appendix.

> (c) [S]uch prohibitions shall not . . . apply to . . . (8) shares of any company the activities of which . . . [are] so closely related to banking . . . as to be a proper incident thereto, but for purposes of this subsection it is not closely related to banking . . . for a bank holding company to provide insurance as a principal, agent, or broker except . . . (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on or before May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, . . . and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition) . . . .

12 U.S.C. § 1843(a) & (c) (1982).

STATEMENT

In 1987, the Board of Governors of the Federal Reserve System ("Board") approved the applications of two bank holding companies, Sovran Financial Corporation ("Sovran") and Maryland National Corporation ("MNC"), to operate insurance agencies. *See* Appendices III, IV, pp. 26a-52a, *infra*. Petitioners obtained review of the Board's

decisions in the D.C. Circuit pursuant to Section 9 of the BHCA, 12 U.S.C. § 1848. The two cases—No. 87-1354 (MNC) and No. 87-1355 (Sovran)—were consolidated for review. Later six "follow-on" petitions were filed in the D.C. Circuit after the Board made similar rulings in those cases. Those six petitions—Nos. 88-1001, 88-1206, 88-1270, 87-1644, 87-1686 and 87-1801—were held in abeyance pending the court of appeals' decision regarding the Sovran/MNC petitions. After the court denied the Sovran/MNC petitions, 856 F.2d 282 "(*Sovran/MNC*)," the court consolidated the six follow-on petitions. The court then issued an order granting the Board summary disposition and denying the petitions for review in the consolidated follow-on cases. *See* Appendix II, pp. 24a-25a, *infra*. The court of appeals' order relied entirely on its earlier *Sovran/MNC* decision. Therefore, although this petition for writ of certiorari seeks review of the court of appeals' decisions in all eight cases, the sole legal issue concerns the analysis in the court of appeals' decision in *Sovran/MNC*.

Bank holding companies are generally prohibited by federal law from engaging in insurance activities. Some bank holding companies, however, are permitted to engage in insurance activities pursuant to a grandfather provision, Exemption D of Section 4(c)(8) of the BHCA, which allows "insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on or before May 1, 1982 . . . ." 12 U.S.C. § 1843(c)(8)(D).

The banking-law issue presented to the D.C. Circuit was whether this grandfather provision in the BHCA applies when a bank holding company that does not possess grandfather rights acquires a company that does possess such rights. The *Sovran/MNC* court permitted the effective transfer of these Exemption D rights from a grandfathered entity to a bank holding company that does not itself qualify for grandfather rights under the statute.

The issue raised in this petition is distinct and is based on fundamental principles of administrative law. The court of appeals, over a strong dissent, misunderstood its obligation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to engage in the careful two-step analysis that requires a court to employ traditional tools of statutory construction and independently assess whether Congress had a clear intent before the court may defer to administrative construction of a statutory provision.

REASONS FOR GRANTING THE WRIT

In interpreting the statute at issue in this case, the D.C. Circuit failed to apply the mandatory first step of analysis this Court set forth in *Chevron*, which requires that a court attempt to discern Congress' intent before granting any deference to the agency's proffered statutory interpretation. Instead, the majority mixed together the two steps and thereby improperly deferred to an agency interpretation at odds with the clearly expressed intent of Congress.

After conceding that the meaning of the statute at issue is unambiguous unless Congress did not mean what it said, the court ignored Congress' plain language only because "we do not believe we can reject the Board's construction based on what might be thought to be a fortuitous choice" of statutory language. 856 F.2d at 287-88. The majority clearly disregarded governing Supreme Court precedent when it "dismiss[ed] perfectly clear language . . . because of a surmise that, in this instance, Congress might not have chosen its words with sufficient care." 856 F.2d at 292 (Buckley, J., dissenting).

The court not only failed to apply the "strong presumption that Congress expresses its intent through the language it chooses," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987), but it actually applied a contrary

presumption: that if the literal language of a statute conflicts with an agency's interpretation, the agency's interpretation will prevail unless there is some reason to believe that Congress' choice of language was other than fortuitous.

A review of recent courts of appeals cases applying the *Chevron* analysis reveals widespread misunderstanding concerning the importance and meaning of the *Chevron* two-step standard. Other circuits, like the D.C. Circuit in this case, are either allowing the agency's interpretation to infect the court's independent analysis of congressional intent, or skipping Step One altogether.

Clarification from this Court is needed to ensure that the *Chevron* analysis, which plays such an important role in the interpretation of federal statutes, be applied uniformly throughout the federal judiciary. It is essential that the judiciary take seriously its role as " 'the final authority on issues of statutory construction' " and " 'reject administrative constructions which are contrary to clear congressional intent.' " *Cardoza-Fonseca*, 480 U.S. at 447-48 (quoting *Chevron*, 467 U.S. at 843 n.9).[2]

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[2] This case involves more than just an issue of administrative law. Also at stake is the careful distinction, long codified by Congress, between banking and commerce. *See* 12 U.S.C. § 1843(c)(8) (BHCA); 12 U.S.C. § 24(Seventh) (National Bank Act). The petitioners believe that the Board's decision in this case ignores this policy, violates the BHCA, and therefore opens the door for anti-competitive activities that the Bank Holding Company Act is designed to prevent.

I. THE COURT OF APPEALS' DECISION MISAPPREHENDS AND MISAPPLIES THE PRINCIPLES FOR REVIEW OF AGENCY ACTION SET FORTH IN *CHEVRON v. NATURAL RESOURCES DEFENSE COUNCIL, INC., INS v. CARDOZA-FONSECA* AND *NLRB v. UNITED FOOD & COMMERCIAL WORKERS UNION*

In *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987), this Court discussed the role of the judiciary in construing a statute that has been interpreted by an administrative agency: "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation *must* be given effect . . . ." *Id.* at 421 (quoting *Cardoza-Fonseca*, 480 U.S. at 446) (emphasis added). Only where the statute is silent or ambiguous with respect to the specific issue may a court defer to a reasonable agency construction. *Id.*

The court of appeals improperly skipped over the first step of the *Chevron* analysis and proceeded to defer to the agency's interpretation of the statute under *Chevron's* Step Two. But Step Two should never have been reached. If the "traditional tools of statutory construction" had been properly applied it would have been clear that the statute is neither silent nor ambiguous with respect to the issue in this case. In fact, given the plain language of the statute—granting grandfather rights to "the bank holding company" engaged in insurance agency activity in 1982—"it require[d] some ingenuity to create ambiguity." *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Rothschild v. United States*, 179 U.S. 463, 465 (1900)).[3]

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[3] Congress' intent is clearly expressed. The statute does not exempt activity engaged in by "any bank holding company" or by "a bank holding company" on the relevant date. Rather it explicitly exempts the activity of a bank holding company only if it is "*the*

Indeed, the majority conceded that the words of the statute, if given their literal meaning, make Congress' intent clear. 856 F.2d at 287-88. Under *Chevron*, "that intention is the law and *must* be given effect." 467 U.S. at 843 n.9 (emphasis added). In other words, the majority found *no ambiguity* in the language chosen by Congress but simply speculated that perhaps Congress did not mean what it clearly said. Such speculation flies in the face of established principles of statutory construction: "'[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. James*, 478 U.S. at 604 (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). In fact, this Court has enforced the explicit language of a statute even when application of that language produced a "curious result." *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 n.7 (1986) (discussing *TVA v. Hill*, 437 U.S. 153 (1978)).[4]

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bank holding company," 12 U.S.C. § 1843(c)(8)(D) (emphasis added), that was engaged in insurance agency activity on May 1, 1982. Thus, the effective transfer of those rights to a non-grandfathered bank holding company is not permitted.

[4] The two judges who made up the panel majority offered a different justification in their concurrence in the denial of rehearing *en banc*. However, that concurrence is *not* part of the D.C. Circuit's decision in this case. The original panel opinion was never vacated and the later concurrence in denial of rehearing *en banc* was just that; it was not a supplement to the court's original decision, review of which petitioners are seeking in this Court. That the later concurrence has no relevance to this petition is demonstrated by the fact that when the court of appeals denied the petitions for review in the six follow-on cases, it relied solely on the original *Sovran/MNC* panel decision. *See* Appendix II.

In any event, as petitioners will demonstrate more fully if given an opportunity to brief the merits, the points raised in the concurrence are contrary to the clear language and structure of the statute. Most importantly, Congress specifically defined the only circumstances in which the acquisition of a company engaged in insurance activities will enable the acquirer to garner Exemption D

This Court recently reaffirmed that "[u]nless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). The court of appeals found no such "exceptional circumstances" or "clearly expressed legislative intention to the contrary" in this case. Indeed, the court concluded that "were we confronted with this question in the first instance, we would prefer petitioners' construction of the statute over the Board's." 856 F.2d at 289.

The court of appeals reasoned nonetheless that it could not "reject the Board's construction based on what might be thought to be a fortuitous choice of an article." [5] 856 F.2d at 288. This statement reveals that the court compounded its error by applying a presumption of correct-

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rights: "[A]ctivities engaged in . . . on May 1, 1982, shall include activities carried on subsequent to that date as the result . . . of the acquisition by such company *pursuant to a binding written contract entered into on or before May 1, 1982*, of another company engaged in such activities at the time of the acquisition." 12 U.S.C. § 1843(c)(8)(D) (emphasis added). There was no such "binding written contract" in any of these cases and, therefore, none of the acquiring bank holding companies qualify as being "engaged in" insurance activity on the relevant date. If Exemption D grandfather rights are interpreted to be transferable generally, the special provision for bank holding companies holding a "binding written contract" on May 1, 1982, would be rendered completely unnecessary and meaningless.

[5] The court was referring to Congress' choice to grant grandfather rights to insurance activity previously engaged in by "the" bank holding company seeking to sell insurance as opposed to merely "a" bank holding company. *See* n.3, pp. 7-8, *supra*.

ness to the Board's interpretation of the statute in making its *Chevron* Step One determination, when in fact the Board's construction does not even become relevant unless Step Two is reached.

According to the court of appeals, the statute "does not explicitly deal with what happens to grandfather rights once the ownership of the entity holding the rights changes" even though the issue "could easily have been addressed in a straightforward fashion by Congress." 856 F.2d at 289. However, as discussed in n.4, pp. 8-9, *supra*, Congress did explicitly and separately consider and discuss the issue of transfer of Exemption D grandfather rights in connection with corporate acquisition and provided that only acquisitions reduced to a contract by May 1, 1982, would yield grandfather rights for the acquiring company. As noted, this provision is totally superfluous if grandfather rights are transferred with corporate ownership as a matter of course. The court of appeals failed to acknowledge that the administrative construction to which it deferred produces this nonsensical result. 856 F.2d at 288.

Moreover, Congress need not explicitly and separately discuss a given situation in order for it to be "directly addressed" within the meaning of *Chevron*, 467 U.S. at 843. A situation is "directly addressed" whenever it is covered by the express language of a statute.

For example, in *Bethesda Hospital Ass'n v. Bowen*, 108 S. Ct. 1255 (1988), the Supreme Court interpreted the statutory requirement that a provider of health care services be "dissatisfied with a final determination of . . . its fiscal intermediary" before gaining the right to an administrative hearing reviewing that determination. The Secretary of HHS argued that the statutory term "dissatisfied" could reasonably be interpreted to include an exhaustion requirement that had not been satisfied. Although Congress had not explicitly and separately dis-

cussed this issue, and even though Congress easily could have addressed it, the Court unanimously found that the "plain meaning of the statute decides the issue," *id.* at 1258, and rejected the Secretary's interpretation under Step One of *Chevron*, *id.* at 1258-60. Likewise, Congress' express language in the BHCA covers this situation: the grandfathered activity must have been engaged in by "*the* bank holding company," 12 U.S.C. § 1843(c)(8)(D) (emphasis added), seeking to sell insurance now.[6]

Because the express language of Exemption D unambiguously covers the situation at issue here, it must be given effect. *See, e.g., Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 420 (1988) ("criteria" unambiguous as used in Black Lung Benefits Reform Act); *Regents of University of California v. Public Employment Relations Board*, 108 S. Ct. 1404, 1408-12 (1988) ("current business of the carrier" and "compensation" unambiguous; no need to address issue of deference to Postal Service where congressional intent clear); *ETSI Pipeline Project v. Missouri*, 108 S. Ct. 805, 817 (1988) (no need to consider issue of deference to Interior Secretary where Flood Control Act unambiguous).

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[6] *Young v. Community Nutrition Institute*, 476 U.S. 974, 980-81 (1986), cited by the court of appeals, does not support its decision to defer to the Board's construction of Exemption D. In *Young*, this Court rejected an arguably "more natural" interpretation of statutory language in favor of the FDA's interpretation. But in *Young* the statute contained a phrase whose meaning was facially ambiguous. The *Young* Court, therefore, deferred to the agency's interpretation rather than impose the interpretation that it found to be "more natural." In this case, the interpretation rejected by the majority is not merely a "more natural" interpretation—it is the only possible interpretation. *See* 856 F.2d at 291 (Buckley, J., dissenting) ("This language could hardly be more precise.").

II. FEDERAL COURT DECISIONS DEMONSTRATE CONFUSION CONCERNING THE APPROPRIATE POINT AT WHICH TO DEFER TO AN AGENCY'S INTERPRETATION OF A STATUTE

The D.C. Circuit is not alone in misunderstanding its responsibility in reviewing administrative decisions. A survey of recent courts of appeals decisions applying the *Chevron* analysis demonstrates that other circuits are also misinterpreting their responsibilities as reviewing courts and are deciding cases under *Chevron's* Step Two even when congressional intent is clear. In *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems*, 856 F.2d 546 (3d Cir. 1988), the Third Circuit adopted an administrative agency's "less-than-literal interpretation," *id.* at 552, of a statute merely because it believed that the statute could "bear the [agency's] interpretation," *id.* at 553, but without first finding that traditional tools of statutory construction failed to produce a clear meaning. The court thereby upheld an assertion of jurisdiction by the ICC that depended upon goods being transported by a motor carrier "on a public highway," even though the motor carrier at issue had moved the freight only within a privately-controlled terminal and not on any public highway.

In *Lehman v. Burnley*, No. 88-6020 (2d Cir. Jan. 13, 1989) (1989 U.S. App. LEXIS 385), the Second Circuit deferred to the Secretary of Transportation's determination that the phrase "State amounts expended" in the Recreational Boating Safety Act ("Act") does not include expenditures by local governments. The meaning of "State" is surely a "pure question of statutory construction," yet the court made no real effort to "try to determine congressional intent, using 'traditional tools of statutory construction.'" *United Food*, 108 S. Ct. at 421. Instead, the Court brushed over Step One stating simply that there was "no indication of congressional intent" and no definition of "State" in the statute itself.

1989 U.S. App. LEXIS at 7. The court's own discussion shows, however, that Congress' intent *was* clear. The court noted that local governments are not part of the "common meaning of 'State,'" the manner in which "State" "is used consistently throughout the Act," or the explicit definition of "State" in the Title containing the Act. The court also noted that Congress had explicitly referred to local governments elsewhere in the Act when it desired to include them. 1989 U.S. App. LEXIS at 7-8. As in the *Sovran/MNC* case, there was clearly no need to even reach Step Two.

In *Diamond Shamrock Exploration Corp. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988), the Fifth Circuit found a statute silent on the issue of whether royalties may be collected on take-or-pay payments made under natural gas contracts and rushed to Step Two when the court's analysis demonstrates that the statute *did* address the issue, and did so unambiguously. The court found the agency's interpretation impermissible under Step Two because it did "not comport with the plain meanings of the words in the lease, and in the relevant statutes and regulations." *Id.* at 1165. Because the "plain meaning" resolved the issue, the court clearly erred in finding the statute silent and in even considering giving deference to the Department of Interior's contrary interpretation. The Fifth Circuit's failure to decide *Diamond Shamrock* under Step One is yet another example of the continuing confusion over the proper application of the *Chevron* principles.

III. THE PROPER STANDARD OF REVIEW OF AGENCY ACTION IS AN IMPORTANT FEDERAL QUESTION AFFECTING ALL JURISDICTIONS

Although this Court has often spoken of the wisdom of deferring to administrative expertise when appropriate, *see, e.g., Chevron*, 467 U.S. at 843-45, this Court has left no doubt about which branch of government

bears the ultimate responsibility for interpreting the laws of this land: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Cardoza-Fonseca*, 480 U.S. at 447-48 (quoting *Chevron*, 467 U.S. at 843 n.9). *See also SEC v. Sloan*, 436 U.S. 103, 118 (1978) ("'[T]he courts . . . "are not obliged to stand aside and rubber-stamp their affirmances of administrative decisions . . . ."'") (citations omitted); *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) ("'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . .'") (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

The *Chevron* two-step test for review of administrative action is much more than just another tool of statutory construction. The *Chevron* standard implements the separation of powers that lies at the heart of our constitutional system. It does so by establishing a fundamental line of demarcation between the role of a reviewing court and the discretion of an administrative agency. Failure of the federal courts to adhere strictly to the strictures of Step One would, *sub silentio*, grant to administrators authority in excess of that intended by Congress. And such a transfer of authority becomes all the more troublesome as the federal courts face more and more federal statutes interpreted by a plethora of administrative agencies.

As demonstrated, *supra*, some courts have lost sight of the purposes that *Chevron* advances. Although "[i]t is emphatically the province and duty of the judicial department, to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), too many courts have abdicated that responsibility and "become the handmaidens of the agency, relegated to deciding not what the law is, but only whether the agency's construction of the law is reasonable." *Mesa Verde Construction Co.*

v. Northern California District Council of Laborers, 861 F.2d 1124, 1146 (9th Cir. 1988) (*en banc*) (Kozinski, J., dissenting). This is a dangerous trend that is completely at odds with this Court's directives in *Chevron*, *Cardoza-Fonseca* and *United Food*.

Despite the frequency with which the *Chevron* analysis is used, confusion remains. It is imperative that this Court clarify the law in this important area to ensure that courts throughout the country will interpret federal statutes consistently and uniformly as well as to maintain Congress' careful allocation of responsibility between administrative agencies and the federal judiciary.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1989

APPENDICES

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 15, 1988 Decided September 9, 1988

No. 87-1354

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Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

SOVRAN FINANCIAL CORP.,
Intervenor

Petitions for Review of Orders of the
Board of Governors of the
Federal Reserve System

Jonathan B. Sallet, with whom *Jamie S. Gorelick* was on the brief, for petitioners. *David G. Webbert* also entered an appearance for petitioners.

Richard M. Ashton, Attorney, Board of Governors of the Federal Reserve System, with whom *John R. Bolton*, Assistant Attorney General, *Richard K. Willard*, Assistant Attorney General,* *J. Virgil Mattingly, Jr.*, and *James A. Michaels*, Attorneys, Board of Governors of the Federal Reserve System, were on the brief, for respondents.

John D. Hawke, Jr., *Kenneth A. Letzler* and *Leigh McGuigan* were on the brief for intervenor Sovran Financial Corporation.

Kenneth C. Bass, III was on the brief for intervenor MNC Financial, Inc.

Ernest Gellhorn and *Robert C. Jones* for Conference of State Bank Supervisors, *John J. Gill* and *Michael F. Crotty* for American Bankers Association, and *Richard Whiting* for Association of Bank Holding Companies, were on the joint brief for *amici curiae*, Conference of State Bank Supervisors, et al., urging affirmance. *James F. Bell* also entered an appearance for *amicus curiae*, Conference of State Bank Supervisors.

Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* BUCKLEY.

SILBERMAN, *Circuit Judge*: In June and July of 1987, the Board of Governors of the Federal Reserve System, which regulates bank holding companies, approved the applications of two bank holding companies, Sovran Financial Corporation ("Sovran") and Maryland National

* At the time the initial brief was filed.

Corporation ("MNC"), to retain insurance agency operations of recently acquired bank holding companies. Each of the two acquired bank holding companies sold insurance pursuant to a grandfather clause in the Garn-St Germaine Act of 1982. Petitioners, various insurance agency trade groups, object to the Board's actions, which allow Sovran and MNC to compete with their members for insurance business. Petitioners contend, in particular, that under the Bank Holding Company Act ("the Act") (as amended by the Garn-St Germaine Act), grandfather rights to sell insurance expire when a grandfathered corporation is purchased by another bank holding company not itself eligible to engage in that business. Alternatively, petitioners claim that the bank holding company acquired by Sovran never legitimately acquired grandfather rights in the first place. We uphold the Board's interpretation of the Bank Holding Company Act, and we decide that the Board was justified in determining that the bank holding company acquired by Sovran possessed grandfather rights. The petitions for review are therefore denied.

I.

In 1985, Sovran Financial Corporation, a bank holding company, applied to the Board for permission to acquire Suburban Bancorp, also a bank holding company, and its subsidiary bank, Suburban Bank. Suburban, a state-chartered bank located in Maryland, in turn controlled a subsidiary corporation, Suburban Insurance, which operated as an insurance agency. Sovran's application to the Board for approval of this acquisition was opposed by various insurance industry trade groups, which argued that the acquisition of an insurance agency by a bank holding company was prohibited by section 4(c)(8) of the Bank Holding Company Act. *See* 12 U.S.C. § 1843(c)(8). In order to avoid delay in its acquisition of Suburban Bancorp, Sovran agreed that

Suburban Insurance would temporarily cease writing new policies, leaving to a later date resolution of the issue raised by the protestants. The acquisition was in that form approved by the Board. In November 1986 Sovran applied to the Board again, this time seeking leave to retain indirect control over Suburban Insurance (which would then resume selling insurance). Sovran claimed that the insurance activities of the subsidiary qualified for Exemption D grandfather rights and that its acquisition of Suburban Bancorp did not extinguish the exemption.[1] This application was again opposed by insurance industry trade groups, but was nevertheless ultimately approved by the Board. *Sovran Financial Corp.*, 73 Fed. Res. Bull. 672 (1987).

The circumstances of Maryland National Corporation's application are similar. MNC, a bank holding company, acquired American Security Corporation, also a bank holding company. American Security Corporation engages in general insurance agency activities through both an unincorporated division and, in Maryland, through a separate subsidiary corporation. The Board approved MNC's acquisition on the condition that MNC either di-

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[1] Sovran argued, in the alternative, that the Board did not have jurisdiction under the Bank Holding Company Act over the activities of a state-chartered bank owned by a holding company. The Board, however, declined to address this issue, and instead approved Sovran's application for grandfather rights under Exemption D. *Sovran Financial Corp.*, 73 Fed. Res. Bull. 672, 673 (1987). Sovran has intervened in this petition in support of the Board's order, and renews its jurisdictional argument before this court. But, only a "party aggrieved by an order of the Board" may obtain review of the order. 12 U.S.C. § 1848 (1982). As Sovran received what it requested—approval of its application—it is not a party aggrieved. *See Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1193 (D.C. Cir. 1987). That Sovran might have preferred the Board to have approved the order under a different legal theory, perhaps, for example, to facilitate future acquisitions of state-chartered banks, does not suffice to make a "party aggrieved." *Transwestern Pipeline Co. v. FERC*, 747 F.2d 781, 785 & n.5 (D.C. Cir. 1984).

vest itself of American Security's insurance business or secure approval under section 4(c)(8). *Maryland National Corp.*, 73 Fed. Res. Bull. 310, 314 (1987) (*"MNC I"*). The Board denied MNC permission to sell insurance pursuant to the separate grandfather privileges of section 4(a)(2) of the Act, determining that a bank holding company was not entitled to section 4(a)(2) grandfather privileges when it purchased a company that had itself previously qualified for these rights. *Id.* at 312. After the acquisition had been effected, MNC applied for Board approval to sell insurance under Exemption D, and the Board granted this request, again over the opposition of insurance agency trade groups. *Maryland Financial, Inc.*, 73 Fed. Res. Bull. 740 (1987) (*"MNC II"*).

The Bank Holding Company Act prohibits a bank holding company from acquiring and retaining shares of any company that is not a bank or a bank holding company and from engaging in nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8). *See generally Independent Ins. Agents v. Board of Governors*, 835 F.2d 1452 (D.C. Cir. 1987). Section 4(a)(2) (as amended in 1970) contains a grandfather clause that exempts nonbank activities of any kind (including insurance agency activity) in which a bank holding company, directly or through a subsidiary, engaged on June 30, 1968. The Garn-St. Germaine Act, passed in 1982, declares that insurance activity is not closely related to banking, and thus effectively prohibits bank holding companies or their subsidiaries from engaging in that business. That act contains seven exemptions to its general prohibition, including two additional grandfather clauses, Exemption D and Exemption G.

Exemption D excludes "insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982." 12 U.S.C. § 1843

(c)(8)(D).[2] Exemption D contains certain limitations on growth that play an important part in the Board's decisions under review here. A bank holding company that sells insurance under Exemption D may not expand its sales activity into states in which it had not sold insurance prior to 1982 (unless the state is adjacent to one in which it did sell insurance), and it may not expand its insurance business to cover types of risks different from those it covered in May 1982. *Id.* Exemption G excludes bank holding companies involved "directly or indirectly, in insurance agency activities as a

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[2] The full text of Exemption D is as follows:

> (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the bank holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982, and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition)[.]

12 U.S.C. § 1843(c)(8)(D).

consequence of approval by the Board prior to January 1, 1971." 12 U.S.C. § 1843(c)(8)(G). Unlike Exemption D, neither Exemption G nor section 4(a)(2) contain any limitations on expansion into new geographical markets or into different lines of insurance and, based on this distinction, the Board has interpreted the Act to allow only Exemption D rights to survive acquisition.

A single bank holding company, for example, one that had been selling insurance prior to 1968, might conceivably qualify to engage in insurance agency activities under all three of these grandfather clauses. Yet if that company were acquired by another bank holding company, the Board would allow the acquiring company to continue selling insurance only pursuant to Exemption D, and any rights that flowed solely from section 4(a)(2) or Exemption G would expire upon the acquisition. Indeed, MNC, whose application is being challenged here, originally applied to the Board for authority to have American Security Corporation, the company it was purchasing, continue selling insurance under section 4(a)(2) and was denied. *MNC I*, 73 Fed. Res. Bull. 310. And, in an order subsequent to those under consideration here, the Board decided that Exemption G grandfather rights would also expire upon acquisition by a non-qualifying company. *Trustcorp, Inc.*, 73 Fed. Res. Bull. 827 (1987) (*"Trustcorp I"*). But in a later decision, the Board allowed that same applicant to continue to engage in insurance activity pursuant to Exemption D. *Trustcorp, Inc.*, 73 Fed. Res. Bull. 934 (1987) (*"Trustcorp II"*).

In its *Sovran* decision, the Board explained that the actual language of the statute does not specifically address the issue under consideration here—whether a bank holding company that qualifies for Exemption D rights may be acquired by another bank holding company without losing those rights. *Sovran Financial Corp.*, 73 Fed.

Res. Bull. at 676. The Board thought that both the legislative history and the terms of the statute itself suggested a congressional intent that Exemption D privileges be identified with the precise entity that originally qualified for them. The Board quoted the Senate Committee Report which states that "[t]he authority to engage in activities under [Exemption D] only extends to the entity, be that the holding company itself or a subsidiary or subsidiaries thereof, which qualifies for the grandfathered activities status." *Id.* (quoting S. REP. NO. 536, 97th Cong., 2d Sess. 40 (1982)). Thus, if a bank holding company owned three banks, only one of which qualified under Exemption D to sell insurance, the other two banks, or any other subsidiaries or affiliates of the bank holding company, could not sell insurance, because "exemption D rights attach [only] to the entity actually conducting the activity on the grandfather date." *Id.* The Board concluded from the circumscribed nature of Exemption D rights that "the intent of the statute is that the grandfathered subsidiary continues to be able to engage in the activity, even if acquired by another bank holding company so long as the subsidiary complies with the geographic and functional limitations proscribed [sic] in exemption D." *Id.*

This outcome, according to the Board, is consistent with the basic purpose of the grandfather clause, which is to provide stability to established business relationships. The geographical and product line limitations on expansion contained in Exemption D continue in effect after acquisition. Therefore, in the Board's words, "the acquisition does not disturb the status quo insofar as the insurance activities of Suburban Insurance are concerned." *Id.* A contrary decision would require the disruption of ongoing commercial relationships whenever a grandfathered bank holding company is acquired by a non-qualifying company.

II.

Petitioners argue that the Board's approval of Sovran's application is arbitrary and capricious because the Board did not adequately explain its disparate treatment of Exemption D grandfathered rights as compared with Exemption G and section 4(a)(2) rights.[3] The Board, according to petitioners, correctly applied three legal principles in its Exemption G and 4(a)(2) orders, but inexplicably ignored these same principles in its *Sovran* and *MNC II* orders. In the Exemption G and 4(a)(2) orders, *MNC I* and *Trustcorp I*, the Board required that the acquiring company independently qualify for grandfather rights. A bank holding company could not, therefore, sell insurance merely because a company it purchased had Exemption G or 4(a)(2) rights. And in *MNC I* the Board reasoned that the absence of any provision in the Bank Holding Company Act, as amended, permitting the transfer of grandfather rights from one bank holding company to another meant that no transfer could be allowed. *MNC I*, 73 Fed. Res. Bull. at 312-13. Finally, in both *MNC I* and *Trustcorp I*, the Board recognized that grandfather clauses are to be construed narrowly, as exceptions to general rules. *Id.* at 313-14; *Trustcorp I*, 73 Fed. Res. Bull. at 829. The Board concluded, therefore, that Exemption G and 4(a)(2) grandfather rights expire when a company with these rights is acquired by a non-qualifying bank holding company.

The Board distinguishes its interpretation of the other two clauses because Exemption D grandfather rights—unlike Exemption G and 4(a)(2) rights—are quite narrow. In particular, as we have noted, Exemption D rights may not be transferred within a bank holding company,

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[3] Intervenor MNC argues that petitioners do not have standing. For the reasons given in *Investment Company Institute v. Board of Governors*, 606 F.2d 1004, 1010-11 (D.C. Cir. 1979), *rev'd on other grounds*, 450 U.S. 46 (1981), we disagree.

and expansion is limited both in terms of geography and product lines. In *Trustcorp I*, the Board explained that the insurance agency sought to be retained there could have, pursuant to Exemption G, "operate[d] in every office of Applicant and could solicit every customer of Applicant for any type of insurance." *Trustcorp I*, 73 Fed. Res. Bull. at 829. And as the Board concluded in *MNC I*, to permit section 4(a)(2) grandfather rights to survive an acquisition "would open a substantial loophole in the Act by allowing a non-grandfathered holding company to engage in a wide variety of nonbanking activities by acquiring one or more of the numerous bank holding companies with existing grandfather rights." 73 Fed. Res. Bull. at 313. On the other hand, the Board reasons that when grandfather rights are themselves limited and cannot expand upon acquisition—as is true of Exemption D rights—the restrictive policy, to which the grandfather rights are an exception, is not so strongly threatened by a change in ownership of the grandfathered entity. Hence, it concludes that Suburban Bancorp is not required to cease its insurance activities upon its acquisition by Sovran Financial, since those activities are not subject to expansion due to the acquisition.

It is, of course, a fundamental precept of administrative law that "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *National Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). In this case, the Board has rather easily met that test by relying—for its differing treatment of the three grandfather clauses—on their different economic impact. The Board's interpretation of Exemption D cannot be successfully attacked as a matter of administrative law merely because the Board has otherwise construed the two companion grandfather

clauses. *See Common Cause v. FEC*, 842 F.2d 436, 441-42 (D.C. Cir. 1988) (where agency provides a reasonable explanation for interpreting the word "name" differently in separate sections of the same statute, its construction is upheld). The real question here, to which we now turn, is whether Exemption D will bear the interpretation the Board places upon it.

III.

Petitioners maintain that the Board's interpretation of Exemption D is contrary to congressional purpose, and so must be rejected. As is now well settled, our role in reviewing an agency's interpretation of a statute it administers is strictly confined. We examine the language of the statute and, if necessary, the legislative history to determine whether Congress had a specific intent. If the agency's interpretation is inconsistent with Congress's clear intent, that interpretation is invalid. Otherwise, we owe considerable deference to the agency, and we must uphold the agency's interpretation is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Securities Indus. Ass'n v. Board of Governors*, slip op. at 8 (D.C. Cir. May 27, 1988).

Under Exemption D, "insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982" is excluded from the general prohibitions contained in sections 4(a)(1) and 4(a)(2) of the Act. *See* 12 U.S.C. § 1843(c)(8)(D). Petitioners assert that the only bank holding companies that may sell insurance, directly or indirectly, under this provision are those actually described in Exemption D, and, insofar as neither Sovran nor MNC was itself "engaged in" selling insurance prior to May 1, 1982, the statute prohibits the two companies from doing so now. That the Board explicity conditioned its approval of Sovran's application to retain Suburban Insurance upon

Suburban remaining an "independent and separate subsidiary of Sovran," *Sovran Financial Corp.*, 73 Fed. Res. Bull. at 677, is irrelevant according to petitioner because Sovran, not Suburban, must meet the grandfather criteria. Petitioners emphasize that Exemption D refers to activity "engaged in by *the* bank holding company" and argue that this reference means that for any bank holding company successfully to assert Exemption D rights, it has to be *the* bank holding company that was engaged in the activities in 1982. The statute, according to petitioners, allows a bank holding company to sell insurance only if that *same* bank holding company was selling insurance prior to May 1, 1982, which is another way of saying grandfather rights may not be transferred with corporate ownership.[4] That argument suggests that Congress meant to resolve the important question whether Exemption D grandfather rights would survive a corporate acquisition by a bank holding company by using the word "the" rather than "a" as the modifier of bank holding company in the first line of Exemption D. This seems to us to be an unlikely way for Congress to signal its intent on such a major issue. We think that "the" as used in this context is a good deal less revealing than petitioners assert, and we do not believe we can reject the Board's construction based on what might be thought to be a fortuitous choice of an article. *Cf. Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986).

Petitioners claim that other language in Exemption D, by implication, supports their suggested interpretation. The exemption specifically allows a bank holding company that was not selling insurance on May 1, 1982 to exercise grandfather rights if it had contracted by that date to purchase a company that was itself selling insurance. This provision, it is argued, demonstrates that Congress explicitly considered the problem of transfers

[4] If Suburban's stock were sold to an individual, however, presumably under petitioners' view, no problem would arise.

of ownership of grandfathered businesses and determined that this particular instance was the only one where an acquiring bank holding company could continue to engage in grandfathered activity. In Latin: *Expressio unius est exclusio alterius.* The Board thinks, however, that Exemption D by itself neither prohibits nor allows any particular activity. It serves instead only to describe whether and when grandfather rights come into existence. The clause regarding a contract to purchase merely sets out one circumstance, according to the Board, in which a corporation will be deemed to be engaged in the sale of insurance on the relevant date and therefore will be entitled to grandfather rights. In the Board's view, Exemption D does not really even address the question of whether, once those rights arise, a bank holding company with grandfather rights may be acquired without losing those rights.

We think both interpretations of the language of Exemption D are plausible; neither in our view flows ineluctably from the statute itself. Nor does the legislative history of Exemption D provide a definite answer to this question. The Senate Committee Report simply explains that:

> The authority to engage in activities under the grandfather amendment only extends to the entity, be that the holding company itself or a subsidiary or subsidiaries thereof, which qualifies for the grand fathered [sic] activities status. *This limitation is intended to prevent a bank holding company from transferring any grandfather authority among the companies within the holding company system.* Thus, for instance, if the grandfathered insurance activity is the sale of property and casualty insurance in connection with loans made by a mortgage banking subsidiary of a bank holding company, that activity cannot be transferred to any other nonbank subsidiary of the same holding company or to any loans made by any other subsidiary.

S. REP. No. 536, 97th Cong., 2d Sess. 40 (1982) (emphasis added).[5] The Board's counsel argues that the very restriction on transfers of grandfather rights within the bank holding company organization that originally qualified for such rights suggests that if the ownership of the bank holding company itself changes hands, and the transfer is thus between independent bank holding companies, the grandfathered entity may continue to exercise its Exemption D rights. To be sure, such a limitation may, as we have indicated, justify permitting grandfathered activities to continue following an acquisition *as a matter of Board policy* (since expansion of those activities would be restricted), but this legislative history does not really bear on the separate question, *whether Congress intended* that grandfather rights should survive an acquisition. We agree with petitioners that an express restriction on the transfer of rights *within* a bank holding organization surely does not indicate that Congress intended such rights to be transferable, through purchase or sale, *among* bank holding companies. If anything, it more nearly suggests the contrary. On the other hand, neither does this excerpt from the committee report demonstrate that Congress had any specific intent that intercorporate transfers not be permitted.

Other legislative history, however, does provide support for an interpretation that would—as does the

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[5] As petitioners point out in their brief, this statement was subsequently modified by the Conference Report, which would allow grandfather rights to be transferred within the holding company "if the transferral is brought about for management or efficiency purposes." H.R. CONF. REP. No. 899, 97th Cong., 2d Sess. 91 (1982). This modification only affects the degree of limitations on intrabank holding company transfers however, and does not bring into doubt that Congress intended there to be some significant restrictions. Furthermore, the modification is not important for purposes of this opinion, for we do not accept the Board's view of the Senate Report in any event.

Board's—allow for measured growth of the grandfathered business.

> The purpose of [Exemption D] is to permit bank holding companies which have been engaged or have received approval to engage in the insurance business *to expand such business, within reasonable limits.* The amendment provides bank holding companies with enough latitude to grow and compete successfully without permitting unbridled expansion of grandfathered activities. Without providing such companies with a broadened ability to expand and grow, they would not survive long in a competitive environment.
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> . . . .
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> While the amendment does restrict the locations and scope of grandfathered insurance activities, there is no limitation placed on increases in the volume of such insurance business which may be achieved by a holding company or nonbank subsidary [sic].

S. REP. NO. 536, 97 Cong., 2d Sess. 39 (1982) (emphasis added).

We are left, then, with competing acceptable interpretations of the words of the statute. While we concede that, were we confronted with this question in the first instance, we would prefer petitioners' construction of the statute over the Board's, it seems to us nevertheless untenable to conclude that "Congress has . . . directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843; *see K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986) (finding ambiguity even where one reading of the statute was probably "the more natural interpretation"); *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 881-82 (D.C. Cir. 1987). The statute does not explicitly deal

with what happens to grandfather rights once the ownership of the entity holding the rights changes. This issue, which obviously holds important consequences for the future relationship between bank holding companies and insurance agency activities, could easily have been addressed in a straightforward fashion by Congress. But nothing in either the language or structure of the statute, or in the legislative history, conclusively resolves this dispute. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (where statute did not explicitly either prohibit or allow for certain agency agreements, administrative determination allowing such agreements is upheld).

We cannot say, moreover—moving to the second step of the *Chevron* inquiry—that the Board's interpretation of Exemption D is unreasonable. Grandfather rights are always in tension with the legislative rule to which they are an exception. Petitioners' suggested interpretation would ameliorate that tension by providing for the inevitable shrinking of grandfather rights under Exemption D. In an era of dynamic mergers and acquisitions in the banking business (of which Congress was well aware, S. REP. No. 536, 97th Cong., 2d Sess. 3-4 (1982)), these grandfather rights, if they could not survive acquisitions would (like Marx's State) wither away. The Board, by permittiing Exemption D rights to survive an acquisition by a bank holding company (and prohibiting the same treatment of Exemption G or 4(a)(2) rights), has taken a middle ground. It has sought, as closely as it could, to maintain the relative status quo in economic or competitive terms. We think that is a permissible reconciliation of the inherent tension of the statute; it ensures that grandfathered insurance activities will expand—"within reasonable limits." Even if we were inclined to strike the balance differently, we would be obliged to defer to the Board since its approach is a

"reasonable accommodation of the conflicting policies." *Baltimore Gas and Elec. Co. v. United States*, 817 F.2d 108, 115 (D.C. Cir. 1987).

IV.

Petitioners also argue, independently of their challenge to the Board's decision to allow grandfather rights to survive acquisition, that Suburban Bancorp never legally qualified for grandfather rights under Exemption D. If petitioners are correct, then, of course, Sovran did not acquire any grandfather rights when it purchased Suburban. Section 225.22(d) of the Board's Regulation Y allows a state bank to "[a]cquire or retain all . . . of the securities of a company that engages solely in activities in which the parent bank may engage." 12 C.F.R. § 225.22(d)(2)(ii) (1988). In 1972 when Suburban Bancorp applied to the Board to become a bank holding company, Suburban Bank relied on this exception to the Bank Holding Company Act's nonbanking prohibitions to permit it to retain indirect control of Suburban Insurance, which was, as we have said, its subsidiary. At that time, Suburban Bancorp notified the Board that Suburban Bank had a subsidiary that was a general insurance agency. And in 1972, the Maryland Deputy Bank Commissioner, in response to a Board inquiry concerning Suburban Insurance, stated that the Maryland Bank Commission was aware of Suburban's insurance activities and "took no exception."[6] Again in 1986, the Maryland Bank Commissioner told the Board that "Suburban's insurance activities are and have been lawful activities for a state-chartered bank in Maryland." The next year, 1987, however, with the acquisition pending, the Maryland Insurance Commissioner informed the Board that,

[6] The Board's inquiry was itself motivated by an inquiry from a law firm representing certain insurance agency trade groups to the Federal Reserve Bank of Richmond concerning Suburban's insurance activities.

under the Maryland Insurance Code, a state chartered bank could not secure a Certificate of Qualification *directly* to engage in insurance activities if the bank was primarily involved in banking rather than insurance. A bank could, nevertheless, own an insurance agency or have employees who were licensed insurance agents, all without violating the Insurance Code.

Petitioners fasten upon the 1987 statement by the Insurance Commissioner that a Maryland bank may not directly sell insurance (although it may do so through a subsidiary) and assert that Suburban Bancorp's acquisition and retention of Suburban Insurance in 1972 violated section 225.22(d) of Regulation Y. It is argued that since Regulation Y allows a bank to own only a company that engages in activities "in which the parent bank may engage," and since the Insurance Commissioner has stated that a bank may not *directly* sell insurance, Suburban Bancorp could not have acquired and retained an insurance agency without violating Regulation Y. Therefore, the argument is that Suburban Bancorp acquired no Exemption D grandfather rights in 1982, because its retention of Suburban Insurance turned out in hindsight to be contrary to Regulation Y. We note that no allegations are made that Suburban Bancorp violated Maryland state law. The contention is rather that the Board was operating under a misconception in assuming, in 1972, that Regulation Y was satisfied, because the Board did not realize—through no fault of Suburban—that a Maryland bank could not directly sell insurance.

The Board rejected petitioners' argument. It stated that

> the overriding factor in this case is that the activities were being conducted on [May 1, 1982] and for many years prior thereto with the knowledge of the Board and state regulatory agencies and *without a*

> *determination* by these agencies that the activities were not in accordance with applicable statutes and regulations.

73 Fed. Res. Bull. at 674-75 (emphasis added). We think the Board acted within its legitimate discretion to interpret both the statutes and its own regulations in that fashion. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). To be sure, legislative history indicates that Congress thought a company "engaged" in the grandfathered activity on May 1, 1982 only if it acted "in accordance with the applicable statutory and regulatory standards as of the grandfather date." S. REP. NO. 536, 97th Cong., 2d Sess. 39 (1982). Still, as the Board notes, the same Senate Report refers to "authorized" insurance activity and the Board, it seems to us, reasonably concluded that it had authorized Suburban's activities even if it did so, as it happened, mistakenly. To deny Suburban's grandfather rights after the bank had operated openly as it did with the full knowledge and tacit or explicit approval of all state and federal regulatory bodies (and without objection from insurance company competitors) for fifteen years would seem inequitable. A contrary ruling, moreover, would subject grandfather rights to subsequent evolving or clarifying interpretations of often complex state laws. In the absence of any indication of bad faith on the part of Suburban, the Board is entitled to do as it did here—recognize those rights as they appeared on the grandfather date. Accordingly, the petitions for review are

Denied

BUCKLEY, *Circuit Judge, dissenting*: This case hangs on the meaning of a single word as used in one clause of a complex statute. If, in context, its meaning is ambiguous and the construction placed on it by the Federal Reserve Board reasonable, the majority properly deferred to the agency's interpretation and reached an appropriate disposition of this case. As I find the statutory language devoid of ambiguity and its clear meaning incompatible with the interpretation placed upon it by the Board, I respectfully dissent.

The word in question is the article "the." It appears in the following context in Exemption D of section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8)(D): "insurance agency activity . . . engaged in by *the* bank holding company or any of its subsidiaries on May 1, 1982" (emphasis added). To place this language in its statutory context, I quote the relevant portions of section 4:

> (a) . . . [N]o bank holding company shall—
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> (1) acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or
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> (2) . . . retain direct or indirect ownership or control of any [such] voting shares . . . or engage in any activities other than . . . those . . . authorized under this chapter . . . and . . . those permitted under paragraph (8) of subsection (c) of this section . . . .
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> (c) The prohibitions in this section shall not apply to . . . (8) shares of any company the activities of which . . . [are] closely related to banking . . ., but for purposes of this subsection it is not closely related to banking . . . to provide insurance as a principal, agent, or broker except . . . (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on

> May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, . . . and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982 . . . .

12 U.S.C. § 1843(a) & (c) (1982).

This language could hardly be more precise. Section 4(a) provides that no bank holding company shall acquire control over any company that is not a bank, nor shall it retain such shares or continue to engage in activities not authorized by the Act, unless *it* qualifies for one of the exemptions described in section 4(c).

Subsection (8)(D) creates an exemption for "any insurance agency activity which was engaged in by *the* bank holding company or any of its subsidiaries on May 1, 1982." In this context, the definite article "the" can *only* refer to the particular bank holding company whose right to proceed with activities otherwise prohibited under section 4(a) is being determined. No other interpertation makes sense. Therefore, as neither Sovran nor MNC was engaged in insurance activity on May 1, 1982, neither falls within the clear terms of this exemption. To be sure, the bank holding companies acquired by Sovran and MNC could qualify for the exemption. This fact cannot be relevant to determining whether Sovran and MNC are also exempt, however, unless the phrase "*the* bank holding company" is read to mean "*any* bank holding company."

The majority concludes that such a reading is reasonable because the case should not depend on "what might

be thought to be a fortuitous choice of an article." Majority Opinion ("Maj. Op.") at 12. I disagree. If a statute is unambiguous, as it is in this case, judicial inquiry is normally complete. *K-Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). I see no reason to dismiss perfectly clear language defining the subset of bank holding companies eligible for a subsection 8(D) exemption because of a surmise that, in this instance, Congress might not have chosen its words with sufficient care.

There are occasions where the Supreme Court has permitted "the" to be construed as something other than a definite article. In *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977), for example, the Court held that a venue statute providing that a bank may be sued in "the" district in which the bank is located did not necessarily restrict actions to a single district. In that case, however, the Court determined that such an interpretation was required because the statute elsewhere provided for venue wherever a bank is "located." 434 U.S. at 38-44. There is no similar tension in this case, where the plain meaning of the definite article ("the bank holding company") is wholly consistent with the statute's purpose in specifying which bank holding companies may acquire or retain a company engaging in an otherwise proscribed activity.

Nor do the citations to the legislative history with which the Board sought to buttress its interpretation require that we ignore the plain meaning of the specific language used by Congress. The Board and the majority both rely on the Senate Report, which describes the function of subsection 8(D) as permitting bank holding companies that "have been engaged or have received approval to engage in the insurance business to expand such business, within reasonable limits." S. Rep. No. 536, 97th Cong., 2d Sess. 39 (1982). While the majority describes this extract as an endorsement for the sort of "measured growth" that would flow from the Board's interpreta-

tion, Maj. Op. at 15, I fail to see how the passage is in any way inconsistent with my interpretation of Exemption D, or how it can be read to override the unambiguous language chosen by Congress to confine its reach. *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 107 S. Ct. 1855, 1860 (1987).

In the absence of any compelling reason to conclude otherwise, we are required both by comity and the rules of construction to presume that Congress meant what it said.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1001

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

And consolidated cases

Before: STARR, BUCKLEY and SENTELLE, *Circuit Judges*

ORDER

[Filed Jan. 18, 1989]

Upon consideration of respondents' motions for summary disposition of petitions for review and the responses thereto, it is

ORDERED that the motions for summary disposition be granted, and the petitions for review are hereby denied. *See National Association of Casualty and Surety Agents, et al. v. Board of Governors*, 856 F.2d 282 (D.C. Cir. 1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX III

FEDERAL RESERVE SYSTEM

Sovran Financial Corporation
Norfolk, Virginia

Order Approving Retention Shares of an Insurance Agency

June 29, 1987

Sovran Financial Corporation, Norfolk, Virginia ("Sovran") a bank holding company within the meaning of the Bank Holding Company Act (12 U.S.C. § 1841 *et al.*) (the "BHC Act"), has applied for the Board's approval under section 4(c)(8)(D) of the BHC Act and section 225.25(b)(8)(iv) of Regulation Y (12 C.F.R. § 225.25 (b)(8)(iv)), to retain indirectly all of the voting shares of Sovran Insurance, Inc., a company that engages in general insurance agency activities, including the sale of life and property and casualty insurance to the general public.

Applicant has total consolidated assets of approximately $14.6 billion and controls banks in Maryland, Virginia and the District of Columbia.[1] Applicant also engages through certain subsidiaries in a variety of nonbanking activities permissible for bank holding companies.

On February 27, 1986, the Board approved an application under the BHC Act by Sovran to acquire Suburban Bancorp, Bethesda, Maryland, and its subsidiary bank, Suburban Bank. Suburban Bank, since 1964, has controlled, pursuant to Maryland law, Suburban Insurance, Inc. (now renamed Sovran Insurance, Inc.), which engages in general insurance agency activities. Suburban Bancorp, which became a bank holding company in 1972

[1] Banking data are as of March 31, 1987.

through acquisition of Suburban Bank, has since that time claimed entitlement to retain indirect ownership and control of the insurance agency under the BHC Act on the basis of section 225.22(d)(2) of the Board's Regulation Y. That regulation allows a state bank owned by a bank holding company to acquire and retain all of the voting shares of a company that engages in activities the parent state bank may conduct directly. 12 C.F.R § 225.22(d)(2).

Sovran's application to acquire Suburban Bancorp was protested by various insurance industry trade groups on the ground that Suburban Insurance's activities are prohibited under Title VI of the Garn-St Germain Depository Institutions Act of 1982. The Garn-St Germain Act amended section 4 of the BHC Act to provide that, with seven specific exceptions, insurance activities are not closely related to banking and thus are not generally permissible for bank holding companies.[2]

The Board's February 27, 1986 Order approving Sovran's acquisition of Suburban Bancorp did not resolve this issue. In response to the protests, Sovran committed that if its acquisition of Suburban Bank were approved, Suburban Insurance would, upon its acquisition by Sovran, cease writing new policies until the Board acted to resolve the legal questions raised by its insurance activities. On the basis of this commitment, the acquisition was consummated on March 31, 1986.[3]

On November 11, 1986, Sovran filed the present application claiming entitlement to retain indirect control

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[2] On October 3, 1986, the Board amended Regulation Y to include in the list of activities that the Board has found to be closely related to banking within the meaning of section 4(c)(8) of the Act and thus permissible for bank holding companies, the insurance agency activities delineated in the seven exemptions to the Garn-St Germain Act. 51 *Federal Register* 36,201 (1986), to be codified at 12 C.F.R. § 225.25(b)(8).

[3] 72 Federal Reserve Bulletin 347 (1986).

over Suburban Insurance pursuant to section 4(c)(8)(D) of the BHC Act, the grandfather provision of the Garn-St Germain Act (hereinafter "exemption D"). This section provides an exception to the general insurance prohibition of the Garn-St Germain Act for any insurance agency activity which was engaged in by a bank holding company or any of its subsidiaries on May 1, 1982, subject to certain geographic and functional limitations.[4]

Notice of the application, affording interested persons an opportunity to submit comments on the proposal, has been published in the *Federal Register*. (51 *Federal Register* 42,138 (1986)). The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 4 of the BHC Act.[5]

Protestants assert that the Board should not approve the application because Suburban Bank is prohibited by Maryland law from engaging directly in general insurance agency activities and thus, under section 225.22(d)(2) of the Board's Regulation Y, could not acquire

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[4] Exemption D restricts grandfathered insurance activities to the state in which the grandfathered bank holding company has its principal place of business, any state immediately adjacent to that state, and any state or states in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982. 12 U.S.C. § 1843(c)(8)(D) and 12 C.F.R. § 225.25(b)(8)(iv).

[5] The Board received comments from the following associations opposing approval of the application ("Protestants"): the Independent Insurance Agents of America, the National Association of Casualty and Surety Agents, the National Association of Surety Bond Producers, the National Association of Life Underwriters, the National Association of Professional Insurance Agents, the Maryland State Association of Life Underwriters, the PIA Association of Pennsylvania, Maryland and Delaware, the American Council of Life Insurance, the American Insurance Association, the National Association of Independent Insurers, and the Alliance of American Insurers.

or retain control of a company engaged in these activities. On this basis, Protestants claim Suburban Insurance was not lawfully held by Suburban Bancorp under the BHC Act or Regulation Y on May 1, 1982, the grandfather date under exemption D, and thus Suburban Insurance does not qualify for grandfather privileges under exemption D. Protestants also contend that, even if Suburban Insurance qualifies for grandfather privileges under exemption D, those grandfather privileges would terminate if it were acquired by another bank holding company, such as Sovran, which has no grandfather rights under the BHC Act.[6]

Applicant responds that Suburban Bancorp and its indirect subsidiary, Suburban Insurance, qualify under exemption D because Suburban Insurance was engaging in the insurance agency activities in question on May 1, 1982, with the full knowledge and consent of the Board and the state regulatory authorities, and that Suburban's grandfather privileges do not terminate when it is acquired by another bank holding company. Alternatively, Applicant contends that the Board should disregard the separate corporate identity of the insurance agency subsidiary and treat its insurance activities as being conducted directly by the parent state bank, and thus, in Applicant's view, outside the scope of the nonbanking and insurance restrictions in section 4 of the BHC Act. Finally, Applicant contends that the nonbanking provisions of section 4 of the BHC Act do not apply to nonbank subsidiaries of holding company banks and thus Suburban Insurance may continue to sell insurance regardless of whether Suburban's Insurance's activities comply with the Board's state bank regulation.

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[6] In addition, Protestants contend that Exemption D only applies where the activities were conducted pursuant to specific approval from the Board under section 4(c)(8) of the Act and that in any event Suburban Bank may not under Maryland law control an affidavit engaged in general insurance agency activities.

After considering the arguments of the Applicant and Protestants, as well as the views of the Maryland Bank Commissioner and the Maryland Insurance Commissioner, the Board has determined that Suburban Bancorp is entitled to retain indirect ownership and control of Suburban Insurance under exemption D and section 225.25 (b)(8)(iv) of Regulation Y and that this entitlement does not terminate upon Suburban Bancorp's acquisition by Sovran. With regard to Applicant's contention regarding the applicability of section 4 of the BHC Act to nonbanking companies controlled by holding company banks, the Board has previously determined that under the specific terms of the BHC Act, the acquisition and retention by holding company banks of voting shares of nonbanking companies is governed by section 4 of the BHC Act.[7] As this case reflects, the Board has had in place since 1971 a regulation promulgated under the BHC Act that governs the type of nonbanking activities in which nonbank companies controlled by holding company banks may engage. In light of the Board's determination regarding Sovran's application for grandfather rights under exemption D, however, the Board finds it unnecessary to address Applicant's alternative contentions, including its views on the scope of coverage of section 4 of the Act.

A. *Suburban Insurance Qualifies For Grandfather Privileges Under Exemption D of the Garn-St Germain Act.*

As indicated, exemption D by its terms provides an exception to the general prohibition on the conduct by bank holding companies of insurance activities for those insurance agency activities engaged in by a bank holding

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[7] See *e.g. Security Pacific Corporation*, 72 *Federal Reserve Bulletin* 800 (1986), and the authorities referenced therein.

company or any of its subsidiaries on May 1, 1982, subject to certain geographic and functional limitations.[8]

The record is clear that on the relevant date, May 1, 1982, Suburban Insurance was engaged in insurance agency activities and therefore meets the literal qualifications for grandfather rights under the exemption. The Board notes that the Senate Banking Committee report associated with exemption D explains that the activities grandfathered under this provision must have been engaged in pursuant to and in accordance with the applicable statutory and regulatory standards in effect on May 1, 1982.[9] Thus, the question raised by this application is whether Suburban Insurance's activities on that date were being conducted in conformance with applicable statutory and regulatory requirements for purposes of exemption D.

Suburban Bancorp never applied under section 4(c)(8) of the BHC Act to acquire or retain indirect ownership or control of Suburban Insurance. Rather, when it applied to become a bank holding company in 1972, Suburban Bancorp relied upon section 225.22(d) of the Board's Regulation Y as authority to acquire and retain indirect control of Suburban Insurance. As noted, this

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[8] 12 U.S.C. § 1843(c)(8)(D). Specifically, paragraph (8) of section 4(c) of the BHC Act provides an exception to the nonbanking prohibitions of section 4(a) of the Act for shares of companies engaged in activities that the Board has determined to be so closely related to banking as to be a proper incident thereto. The Garn-St Germain Act amended this paragraph to provide that:

> for purposes of this subsection, it is not closely related to banking or managing a controlling banks for a bank holding company to provide insurance as principal, agent, or broker except . . . (D) any insurance activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982 . . . . 12 U.S.C. § 1843(c)(8).

[9] S. Rep. No. 536, 97th Cong., 2d Sess. 39 (1982).

regulatory provision provides an exception to the general nonbanking prohibitions of the BHC Act by permitting a state bank, without the Board's prior approval, "to acquire or retain all . . . of the securities of a company that engages solely in activities in which the parent bank may engage, at locations which the bank may engage in the activity, and subject to the same limitations as if the bank were engaging in the activity directly." 12 C.F.R. § 225.22(d)(2).

In order to qualify under this regulation, the company in question must be engaged in activities that the bank could conduct directly.[10] Protestants argue that Suburban Insurance is not now, and was not on May 1, 1982, operating in accordance with this requirement of the Board's regulation because Maryland banking and insurance law prohibit a Maryland bank from engaging directly in insurance agency activities.[11]

The insurance activities of Suburban Bank may be traced back to 1922, when Prince George's Bank, a predecessor of Suburban Bank, sold insurance through licensed agents. Insurance sales by employees of the bank predecessor institutions continued, and in 1955 a formal insurance department was organized within the bank. In 1964, Suburban Bank consolidated the insurance department with an incorporated affiliate of the bank that

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[10] *See e.g., Piedmont Carolina Financial Services*, 59 Federal Reserve Bulletin 766 (1973), where the Board stated that this regulatory provision would permit a holding company to acquire a company engaged in insurance activities that the bank could conduct directly. The Board specifically noted, however, that this company could not be acquired under this provision, if state law permitted the bank to invest in shares of a company engaging in this activity, but did not permit the bank to engage in the activity directly.

[11] Protestants also assert that this provision of Regulation Y is invalid. However, since this regulation was in effect on May 1, 1982, compliance with it would satisfy the requirements of exemption D, regardless of later challenges to its validity.

was engaged in holding bank premises, Citizens Building, Inc. In 1984, the subsidiary's name was changed to Suburban Insurance, Inc.

In connection with its application to become a bank holding company in 1972, Suburban Bancorp advised the Board that Suburban Bank controlled a general insurance agency, and Suburban has subsequently kept the Board apprised of the affiliate's insurance activities. On September 12, 1972, the Federal Reserve Bank of Richmond, in order to respond to an inquiry from a law firm representing certain insurance interests, inquired of the Maryland Bank Commissioner whether such insurance activities were permitted for state banks in Maryland. On September 14, 1972, the Maryland Deputy Bank Commissioner responded by advising that the Department was aware of the insurance activities of Suburban and "took no exception." In 1986, in connection with the processing of Sovran's application to acquire Suburban Bancorp, the Maryland Bank Commissioner advised the Board that that office had been aware of the insurance agency activities conducted by Suburban Bank directly and through Suburban Insurance and that "Suburban's insurance activities are and have been lawful activities for a state-chartered bank in Maryland."

However, in 1987 the Maryland Insurance Commissioner informed the Board that Suburban Bank could not engage *directly* in insurance agency activities under the State Insurance Code as it now stands and as it stood in 1982.[12] Under Maryland law, only a corporation engaged primarily in the insurance business may obtain an insurance license.[13] The Commissioner advised that

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[12] See letter of Mr. Edward J. Mulh, State Insurance Commissioner, dated May 18, 1987. See also, *Goodman* v. *Perpetual Building Ass'n.*, 320 F. Supp. 20, 36 (D.D.C. 1970).

[13] *Md. Ann. Code*, art. 48A, § 168(d) (1979), now codified at *Md. Ann. Code*, art. 48A, § 168(e) (1986).

because Suburban Bank is primarily engaged in the banking business, it could not be issued a license to sell insurance and could not receive commissions for procuring or influencing the procurement of insurance sales.[14] The Insurance Commissioner confirmed that Suburban Bank could control a company that holds a license to sell insurance and that Suburban Insurance's current activities were fully consistent with Maryland insurance laws.

While it now appears in retrospect that Suburban Insurance's activities did not qualify for the exemption under the section 225.22(d)(2) of Regulation Y on May 1, 1982, the overriding factor in this case is that the activities were being conducted on that date and for many years prior thereto with the knowledge of the Board and state regulatory agencies and without a determination by these agencies that the activities were not in accordance with applicable statutes and regulations. On this basis, the Board finds that Suburban Insurance qualifies for grandfather privileges under exemption D.[15]

The purpose of a grandfather provision is to avoid the disruption of settled and established relationships and to

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[14] *See* Md. Ann. Code, art. 48A, §§ 167(a) and (c) and 168(d)(1979); Md. Ann. Code, art. 48A, §§ 167 and 168(e)(2) (1986).

[15] Protestants further contend that a Maryland bank is not authorized under Maryland banking law to sell insurance. As noted, the Maryland Bank Commissioner has advised the Board in writing on two occasions (in 1972 and in 1986) that Suburban Bank's insurance activities are authorized under Maryland banking law. The Commissioner has referred to a provision of the Maryland Code that permits a state bank to exercise all of the powers usual in carrying on a banking business. (Md. Financial Institutions Code § 3-206(b)(12)).

The present application does not require the Board to resolve this dispute over permissible banking powers under Maryland law. Even if the Maryland Bank Commissioner's conclusion is erroneous, the Board nevertheless believes that Suburban Insurance qualifies for the grandfather privileges under exemption D in light of the facts and circumstances relating to its conduct of insurance activities on May 1, 1982, as discussed in detail in this Order.

maintain the status quo. The legislative history of exemption D specifically states that it is intended to permit the "continuation of previously authorized insurance activities." [16] The insurance activities of Suburban Insurance were authorized to the extent that these activities were conducted with the full knowledge of and without objection from the Board on May 1, 1982, and are thus within the type of insurance activity Congress sought to protect in exemption D. While it appears that, based on information brought to the Board's attention in 1987—16 years after Suburban became a bank holding company and informed the Board of its interest in Suburban Insurance—Suburban Insurance may not have technically qualified under the Board's regulation, that determination should not be applied retroactively to deprive the company of a benefit which under the terms of the statute are made available to any company engaged in the activity on May 1, 1982. Further, given the intent of the grandfather provision, it would not appear appropriate to upset settled and long-standing relationships which existed on the grandfather date with the knowledge of and without objection from appropriate regulatory authorities.

In this regard, the Board has considered the legislative history of exemption D which, as noted, indicates that grandfather privileges were not intended for companies that were operating in violation of applicable statutes and regulations. This legislative history does not, however, in the Board's view, indicate a Congressional intent to foreclose grandfather rights to holding company subsidiaries that had been selling insurance on the grandfather date with the approval of state banking and insurance regulatory authorities and with no determination by the Board that the activities of the subsidiary were not in compliance with the BHC Act or Board's regulations under the Act. In such circumstances, showing that the

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[16] S. Rep. No. 536, 97th Cong. 2d Sess. 71 (1982).

bank holding company was not operating in disregard of applicable statutes or regulations on the grandfather date, the holding company would, in the Board's view, qualify for grandfather rights under the terms and Congressional intent of exemption D.

Finally, the Board believes that equitable considerations would also indicate that since the insurance activities of Suburban Insurance were known to the public since 1972, and were being conducted with the knowledge of the Board since that date, it would be unfair to now penalize Suburban Insurance for any incorrect assumptions regarding state law. For example, in *Independent Bankers Association of America v. Heimann*,[17] the court held that an industry trade group could not challenge an interpretive ruling of the Comptroller of the Currency which had been issued 12 years earlier and of which the trade group had knowledge. The court stated: "Equity will not protect a party that through years of silence has created an impression of acquiescence that has led others to make substantial financial commitments." *Id.* at 488.

Protestants also argue that in order to qualify for grandfather privileges under exemption D, the bank holding company must have obtained specific approval from the Board under section 4(c)(8) of the BHC Act to conduct the particular activity and that the insurance activity must be directly related to an extension of credit by an affiliate as opposed to the type of general insurance activity conducted by Suburban Insurance. Because Suburban Insurance's activities were not specifically approved by Board order under section 4(c)(8) of the Act and are not confined to the sale of credit-related insurance, Protestants claim Suburban Insurance does not qualify under exemption D. Neither the language of exemption D nor its legislative history supports this position.

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[17] 627 F.2d 486 (D.C. Cir. 1980).

The language of the statute states clearly and unambiguously that it applies to any insurance activity that was engaged in on May 1, 1982, *or* which was approved by the Board on or before that date. Thus, the language itself does not limit grandfather rights to the sale of credit-related insurance or to insurance activities that were specifically approved by the Board by order under section 4(c)(8).

The legislative history of this section confirms this interpretation. A prior version of the statute (H.R. 2255, 96th Cong. 1st Sess. (1979)) grandfathered insurance activities which were engaged in on or before a grandfather date, but only if such activities were specifically approved by the Board. During hearings on this bill held by the House Banking Committee, the Association of Bank Holding Companies protested that this grandfather provision "fails to take into consideration insurance activities which were "grandfathered" in 1956, 1966 and 1970, and for which there was never an occasion to have an application approved by the Board." [18] Following these hearings, the House Banking Committee reported out a version of H.R. 2255 that deleted the requirement for Board approval, and instead grandfathered any insurance activity lawfully engaged in on the specified grandfather date. (H.R. Rep. No. 845, 96th Cong. 2d Sess. (1980)). This grandfather language was adopted, with modifications, by the Senate (See, S. Rep. No. 923, 96th Cong. 2d Sess (1980)).

In the Board's view, this legislative history makes it clear that the grandfather provision in exemption D was not intended to be limited to the credit-related property and casualty insurance activities approved by the Board under section 4(c)(8) of the Act prior to enactment of the Garn-St Germain Act.

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[18] *Hearings on H.R. 2255 before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. 285 (1979).

B. *Suburban Insurance's Grandfather Privileges do not Terminate Upon its Acquisition by a Non-Grandfathered Bank Holding Company.*

Under section 4 of the BHC Act, Sovran may not directly or indirectly acquire control of a nonbank company, unless the acquisition qualifies under one of the exceptions found in the Act. 12 U.S.C. § 1843(a). In this case, Sovran is claiming the exception in section 4 (c)(8)(D), which as noted grandfathers insurance activities conducted by a bank holding company or any of its subsidiaries on May 1, 1982. However, on this date, Suburban Insurance was a subsidiary of Suburban Bancorp, thus raising the issue whether Suburban Insurance loses its grandfather rights under exemption D when its parent holding company is acquired by another bank holding company.

Section 4(c)(8)(D) of the BHC Act does not specifically deal with this question. The Senate Committee report associated with this legislation, however, explains that:

> The authority to engage in activities under the grandfather amendment only extends to the entity, be that the holding company itself or a subsidiary or subsidiaries thereof, which qualifies for the grandfathered activities status.[19]

This legislative history as well as the terms of the statute indicate a Congressional intent that the grandfather privilege be limited to the entity which *qualifies* for the grandfather privilege under exemption D, in this case Suburban Insurance. In other words, exemption D rights attach to the entity actually conducting the activity on the grandfather date. As long as it is only that grandfathered subsidiary that conducts the activity and not some other affiliate, the requirements of exemption D are satisfied. Thus, in the Board's view, the intent of

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[19] S. Rep. No. 536, 97th Cong., 2d Sess. 40 (1982).

the statute is that the grandfathered subsidiary continues to be able to engage in the activity, even if acquired by another bank holding company so long as the subisiary complies with the geographic and functional limitations proscribed in exemption D.

The Board believes this conclusion is consistent with the overall intent of the grandfather provision to permit the continuation of established relationships. There is nothing in the legislative history that suggests that a company that was engaged in an insurance activity under the BHC Act for many years should cease the activity because it is acquired by another bank holding company, when the acquisition would not add an additional insurance competitor or permit the grandfathered subsidiary to expand its activities. As noted, Suburban Insurance could not expand its insurance activities to any location or in any manner other than as permitted under exemption D before Suburban's acquisition by Sovran. In other words, the acquisition does not disturb the status quo insofar as the insurance activities of Suburban Insurance are concerned.

On two prior occasions, the Board has determined that grandfather privileges under exemption D do not terminate when the grandfathered entity is acquired by another bank holding company, provided the insurance activities continue to be conducted by the subsidiary that actually conducted the activity on the grandfather date and would not be expanded to other affiliates of the bank holding company.

In 1983, the Board allowed Seafirst Corporation to continue to sell credit-related property and casualty insurance after its asquisition by BankAmerica.[20] The Board noted that Seafirst was entitled under the terms of exemption D to continue to sell the insurance because it

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[20] *BankAmerica Corporation*, 69 Federal Reserve Bulletin 568 (1983).

was lawfully engaged in the activity on May 1, 1982, pursuant to a prior Board approval. The Board concluded that Seafirst could continue to engage in that particular activity after its acquisition by BankAmerica because Seafirst would remain an independent and separate subsidiary of BankAmerica and the activity would not be conducted by any other subsidiary of BankAmerica or through any of its other offices. The Board concluded that under the circumstances presented there, the grandfathered insurance activity would not be transferred to any other entity or conducted beyond the scope Congress intended in exemption D.

Similarly, in late 1983, the Board permitted the Fuji Bank, Ltd. to acquire Walter Heller Inc.'s commercial finance subsidiary, including a subsidiary that sold property and casualty insurance in connection with loans by the finance company.[21] The Board noted that the Heller subsidiary was entitled to grandfather rights under exemption D because it received Board approval to engage in the activity before May 1, 1982. As in the *BankAmerica* case, the Board allowed the subsidiary, after its acquisition by Fuji, to continue to conduct the grandfathered activity, noting that the insurance agency would remain an independent and separate subsidiary of Fuji, would conduct activities only from its office in Chicago and only in connection with loans by the finance company.[22]

The Board notes that it has in the past required the termination of grandfather privileges under section 4(a) of the BHC Act when the company entitled to those rights

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[21] *Fuji Bank, Limited*, 69 Federal Reserve Bulletin 50 (1983).

[22] The Board relied upon the above legislative history which indicates that grandfather rights under exemption D accrure to the entity actually conducting the relevant insurance agency activity, in that case the nonbank subsidiary of Heller.

was acquired by another company.[23] However, unlike the situation under exemption D, the terms and legislative history of the grandfather provision of section 4(a) indicate that grandfather rights were limited only to those companies that were initially brought under the terms of the Bank Holding Company Act by the 1970 amendments to that Act. As discussed above, the terms of exemption D and its legislative history indicate that a grandfathered bank holding company would be permitted to continue to conduct insurance activities so long as the grandfathered activities are conducted by the subsidiary that was conducting the activity on May 1, 1982.

Based on these factors, the Board concludes that Sovran may retain indirect ownership and control of Suburban Insurance, pursuant to section 4(c)(8)(D), provided that Suburban's general insurance agency activities are limited to those conducted on the grandfather date and that these activities are conducted only by Suburban Insurance, which must remain an independent and separate subsidiary of Sovran. Consistent with the provisions of exemption D, Suburban Insurance must limit its general insurance agency activities to the state in which its parent holding company, Suburban Bancorp, maintained its principal place of business on May 1, 1982 (*i.e.* Maryland), states adjacent to Maryland including the District of Columbia, and any additional states in which Suburban Insurance conducted insurance agency activities on May 1, 1982. See 12 U.S.C. § 1843(c)(8)(D) and 12 C.F.R. § 225.25(b)(8)(iv).

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[23] *See Maryland National/American Security Corporation*, 73 Federal Reserve Bulletin 310 (1987), where the Board approved the acquisition upon the condition that the applicant divest grandfathered nonbanking activities conducted by the acquired bank holding company.

C. *Other Issues.*

Protestants question whether Suburban Bank may be lawfully affiliated with an insurance agency under Maryland banking law, even if the exemption D provision applies. The Protestants note that the Maryland Banking Code provides that, except with the prior approval of the State Bank Commissioner, no banking institution may have an affiliate. (Md. Financial Institutions Code § 5-403 (1986)). The Bank Commissioner may approve an affiliation with a company providing insurance services, but only if the approval imposes the same conditions that federal law requires or permits for a national bank. (Id.) Since national banks are not currently authorized to conduct the types of general insurance agency activities at issue here (except in towns with populations of 5,000 or less), Protestants conclude that Suburban Bank cannot be lawfully affiliated with a company engaging in such insurance agency activities.

On March 12, 1987, the Maryland Bank Commissioner advised the Board that Suburban Bank's control of the insurance affiliate was permissible under the Maryland Banking Code. Under the Maryland Banking Code, restrictions on bank affiliations do not affect any affiliate, if the affiliation existed on June 1, 1935. (Md. Financial Institutions Code § 5-402 (1986)). In this instance, since the affiliation in question can be traced back to 1932, it would appear to be exempt from the provisions in the Maryland Code limiting affiliations of Maryland banks. Based on this analysis of Maryland law, the Board has determined to accept the Maryland Bank Commissioner's conclusion with respect to the consistency of this particular affiliation under Maryland law insofar as it applies to the conduct of insurance agency activities that the affiliate has conducted since 1964.

D. *Public Benefits.*

While the Board has determined that Suburban Insurance's general insurance activities are permissible under section 4(c)(8)(D) of the BHC Act and section 225.25(b)(8)(iv) of Regulation Y, the Board must also determine that these activities are a proper incident to banking under section 4(c)(8) of the Act. In making this determination, the Board must consider whether the performance of the activity can reasonably be expected to produce benefits to the public that outweigh possible adverse effects.

The Board believes that approval of this application will maintain competition in the provision of insurance agency services in the area served by Suburban Insurance and will avoid disrupting established relationships between Suburban Insurance and its customers. The Board finds that there is no evidence in the record to indicate that approval of this proposal would result in undue concentration of resources, unfair or decreased competition, conflicts of interest, unsound banking practices, or other adverse effects. Accordingly, the Board has determined that the balance of the public interest factors it must consider under section 4(c)(8) of the Act is favorable and consistent with approval of the application.

E. *Request for Hearing.*

Protestants have requested that the Board conduct a hearing on the application in order to determine the historical facts that underlie Suburban's entry into the insurance field, the status of Maryland law, and Sovran's plans to expand its insurance operations in the future. Under section 4 of the Bank Holding Company Act, a protestant is not entitled to a hearing on every application. A hearing is only required when there are material issues of fact in dispute.[24]

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[24] *Connecticut Bankers Assn.* v. *Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980).

In this case, there are no material issues of fact in dispute. The historical facts relating to Suburban's entry into the insurance field have been established, and no specific allegation has been made that these facts are in error. The issues relating to Maryland law and its interplay with the Bank Holding Company Act are legal isissues, not factual, and therefore a hearing is not required to resolve this matter. With respect to the future activities of Suburban Insurance, exemption D specifically limits the geographic and functional scope of the grandfathered insurance activities, and thus Sovran's future plans with respect to these activities are circumscribed by the statute. Accordingly, the Board has determined that a hearing is not required in this case and hereby denies protestants' request for a hearing.[25]

Based on the foregoing, the Board has determined that the application under section 4 should be, and hereby is, approved. This determination is subject to all of the conditions set forth in Regulation Y, and the requirement that the insurance activities are conducted solely by Sovran Insurance, which must remain an independent subsidiary of Suburban Bancorp. It is also subject to the Board's authority to require such modification or termination of activities of the bank holding company or any of its subsidiaries as the Board finds necessary to assure compliance with, and prevent evasions of, the provisions and purposes of the BHC Act and the Board's regulations and orders issued thereunder.

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[25] One protestant makes the claim that a public hearing is required under the net public benefits standard in the Act because of issues relating to the nature and extent of Suburban Insurance's proposed activities. However, as noted Suburban Insurance's activities will be limited by the statute to those in which it was engaged on May 1, 1982, subject to the functional and geographic restrictions in section 4(c)(8)(D) and the Board's Regulation Y. Accordingly, the Board does not believe a hearing is appropriate or necessary with regard to this claim.

By order of the Board of Governors,[26] effective June 29, 1987.

/s/ William W. Wiles

WILLIAM W. WILES
Secretary of the Board

[SEAL]

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[26] Voting for this action: Chairman Volcker and Governors Seger, Angell, and Kelley. Absent and not voting: Governors Johnson and Heller.

APPENDIX IV

FEDERAL RESERVE SYSTEM

MNC Financial, Inc.
Baltimore, Maryland

Order Approving Application to Retain
Insurance Agency Activities

July 2, 1987

MNC Financial, Inc., Baltimore, Maryland, a registered bank holding company within the meaning of the Bank Holding Company Act ("BHC Act") (12 U.S.C. § 1841 *et seq.*), has applied for the Board's approval under section 4(c)(8)(D) of the BHC Act (12 U.S.C. § 1843(c)(8)(D)) and section 225.25(b)(8)(iv) of Regulation Y (12 C.F.R. § 225.25(b)(8)(iv)) to retain the insurance agency activities of its subsidiary, American Security Corporation, Washington, D.C. ("Company"), which is also a bank holding company. These activities primarily include comprehensive lines of property and casualty insurance and exclude general life insurance sales. Company currently conducts these insurance activities in the District of Columbia and Virginia through an unincorporated division, and in Maryland, through a separate subsidiary corporation, American Security Insurance Corporation of Maryland ("ASI").

Applicant is the largest commercial banking organization in Maryland with 19.4 percent of the total deposits in commercial banks in that state. Applicant's lead bank subsidiary operates 203 branch offices in Maryland and controls total domestic deposits of $5.2 billion. Applicant, through Company, is the second largest commercial banking organization in the District of Columbia, with 24.7 percent of the total deposits in commercial banks there. Applicant's sole bank subsidiary in the District of Colum-

bia operates 31 branches and controls total domestic deposits of $2.5 billion.[1] Applicant also engages through wholly owned subsidiaries in various nonbanking activities which the Board previously has determined are permissible for bank holding companies.

On February 13, 1987, the Board approved Applicant's application under section 3 of the BHC Act to acquire Company, subject to the condition that it divest within two years certain otherwise impermissible nonbanking activities previously conducted by Company pursuant to grandfather privileges granted under section 4(a)(2) of the BHC Act.[2] The Board noted, however, that it would not require divestiture of all nonbanking operations if, within that two-year interval, Applicant secured approval under section 4(c)(8) of the BHC Act to retain any of Company's previously grandfathered activities. Soon thereafter, Applicant filed this application for approval to retain Company's and ASI's general insurance agency activities pursuant to Title VI of the Garn-St Germain Depository Institutions Act of 1982 ("Garn-St Germain Act"), codified at sections 4(c)(8)(A) through (G) of the BHC Act. (12 U.S.C. §§ 1843(c)(8)(A) through (G)).

Notice of this application, affording opportunity for interested persons to submit comments, has been duly published (52 *Federal Register* 9215 (1987)). The time for filing comments has expired, and the Board has considered the application and all comments received[3] in

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[1] State deposit data are as of December 31, 1986, and exclude Applicant's credit card bank in Delaware.

[2] *Maryland National Corporation*, 73 Federal Reserve Bulletin 310 (1987). The Board concluded that grandfather rights under section 4(a)(2) of the BHC Act accrue only to one-bank holding companies, like Company, that first became subject to the BHC Act by enactment of the 1970 Amendments, and that MNC is not such a company. 12 U.S.C. § 1843(a)(2).

[3] The Board received comments in opposition to Applicant's proposal from the Independent Insurance Agents of America, Inc.;

light of the public interest factors set forth in section 4(c)(8) of the BHC Act.

Title VI of the Garn-St Germain Act amended the nonbanking prohibitions in section 4 of the BHC Act to provide that insurance agency and underwritng activities are not permissible for bank holding companies. Title VI provided seven specific exceptions to this prohibition, however, including grandfather rights under one of the exemptions for "any insurance activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982" (hereinafter "exemption D"), 12 U.S.C. § 1843(c)(8)(D).[4] Applicant claims that Company and ASI were engaged lawfully in general insurance agency activities on May 1, 1982, the applicable grandfather date under exemption D, and that Company and ASI therefore may be permitted to continue these insurance agency operations even after their recent acquisition by Applicant.

Protestants argue that Company and ASI were not engaged lawfully in insurance on May 1, 1982, because they never received formal Board approval pursuant to an application filed under section 4(c)(8) of the BHC Act. Protestants argue that exemption D extends only to credit-related property and casualty insurance, and limits subsequent activities to those states where such insurance was conducted on the grandfather date. In any event, Protestants contend that exemption D rights expire upon

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National Association of Life Underwriters; National Association of Professional Insurance Agents; National Association of Casualty & Surety Agents; and National Association of Surety Bond Producers ("Protestants").

[4] On October 3, 1986, the Board amended Regulation Y to include the insurance agency activities delineated in the seven exemptions to the Garn-St Germain Act in the list of activities that the Board has found to be closely related to banking within the meaning of section 4(c)(8) of the Act and thus permissible for bank holding companies. 51 *Federal Register* 36,201 (1986), codified at 12 C.F.R. § 225.25(b)(8) (1987).

the acquisition of a grandfathered company by another bank holding company.

Eligibility under Exemption D. The record demonstrates that on May 1, 1982, Company and ASI were engaged lawfully in general insurance agency activities. Company and ASI therefore meet the literal qualifications for grandfather rights under exemption D. Company began conducting a general insurance agency in the District of Columbia and Virginia in 1957, and in Maryland in 1978. In 1976, the Board determined that Company was entitled to conduct these activities by virtue of grandfather rights granted under section 4(a)(2) of the BHC Act to bank holding companies, such as Company, which were brought within the coverage of the BHC Act by enactment of the 1970 Amendments. 12 U.S.C. § 1843(a)(2).[5] ASI, Company's insurance subsidiary in Maryland, was established pursuant to section 4(c)(11) of the BHC Act, which allows any banking organization that qualifies for grandfather rights under the 1970 Amendments to establish a subsidiary company, as long as the new company engages only in activities permitted for its grandfathered parent organization. 12 U.S.C. § 1843(c)(11). The insurance activities of Company and ASI in Virginia, Maryland and the District of Columbia therefore are eligible for exemption D grandfather privileges. As the Board determined in the *Sovran* case,[6] neither the language of exemption D nor its legislative history supports Protestants' contention that grandfather privileges under exemption D are limited to credit-related property and casualty insurance or to activities previously approved by Board order under section 4(c)(8) of the BHC Act.

Retention of Grandfather Privileges. In its *Sovran* decision, the Board also concluded that any company that is

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[5] *See American Security Corporation,* Order dated July 21, 1976.

[6] *Sovran Financial Corporation,* Order dated June 29, 1987.

entitled to engage in insurance agency activities under exemption D does not lose those rights upon its acquisition by another bank holding company, provided that the grandfathered entity retains it separate corporate structure, and its insurance activities are not conducted by other companies within the acquiring banking organization.[7] In the instant case, following its acquisition by Applicant, Company would remain as a separate bank holding company, and ASI would remain a separate nonbank subsidiary thereof, and their grandfathered insurance activities would not be conducted by Applicant or other entities within Applicant's organization. Company and ASI therefore may retain their exemption D grandfather privileges after acquisition by Applicant.[8]

Geographic Scope of Activities. Under the terms of section 4(c)(8)(D),[9] however, Company and ASI may continue to conduct grandfathered insurance activities

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[7] *See also, BankAmerica Corporation,* 69 Federal Reserve Bulletin 568 (1983); *Fuji Bank, Limited,* 69 Federal Reserve Bulletin 50 (1983).

[8] The Board incorporates herein by reference the findings and analysis in its *Sovran* decision regarding the types of insurance agency activities covered by exemption D and regarding the retention of grandfather privileges under exemption D following acquisition of the grandfathered company by another banking organization.

[9] Specifically, exemption D limits the geographic scope of permitted activities to:

> sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the banking holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982.

only in Company's home state, the District of Columbia, the adjacent states of Maryland and Virginia, and any other state in which either Company or ASI was engaged in insurance activities on May 1, 1982. Contrary to Applicant's view, then, the scope of grandfather authority granted to Company and ASI does not extend nationwide.[10] The facts of record show that Company and ASI have confined their grandfathered insurance operations to the District of Columbia, Virginia and Maryland, and that neither Company or ASI has ever received approval from the insurance commission in any other state to conduct insurance operations. Because Company and ASI were authorized on May 1, 1982, to engage in insurance only in the District of Columbia, Virginia and Maryland, they may not now expand their grandfathered insurance activities under exemption D to other states.

Proper Incident to Banking. In considering any application under section 4(c)(8) of the BHC Act, the Board must determine whether the proposed activity is a proper incident to banking; that is, whether performance of the activity can reasonably be expected to produce benefits to the public that outweigh possible adverse effects. As a result of Applicant's proposal, consumers in the District of Columbia, Virginia and Maryland would benefit from ongoing access to Company and ASI as a source of insurance products and services. The continuation of grandfathered operations by Company and ASI thus would serve to maintain existing business relationships and expectations, and also would preserve Company and ASI as viable competitors in the insurance agency indus-

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[10] This conclusion is unaltered by the absence of a geographic limitation in the Board's July 21, 1976 Order regarding Company's selection 4(a)(2) grandfather privileges. Applicant has applied to retain the insurance activities under section 4(c)(8)(D), which limits the geographic scope of the activities conducted. As noted, Applicant's application to retain Company's insurance activities under section 4(a)(2) was denied by the Board.

try. Conversely, there is no evidence to suggest that Applicant's proposal would result in undue concentration of resources, unfair or decreased competition, conflicts of interest or other adverse effects. The balance of public interest factors therefore is favorable in terms of Company's and ASI's ability to continue their grandfathered insurance operations in the District of Columbia, Virginia and Maryland following acquisition by Applicant.

Based on the foregoing and other facts of record, the Board has determined that the application under section 4 should be, and hereby is, approved. This determination is subject to all of the conditions set forth in Regulation Y, and provided that the insurance activities are conducted solely by Company and ASI, which must remain as independent subsidiaries of Applicant. It is also subject to the Board's authority to require such modifications or termination of activities of the bank holding company or any of its subsidiaries as the Board finds necessary to assure compliance with, and prevent evasions of, the provisions and purposes of the Act and the Board's regulations and orders issued thereunder.

By order of the Board of Governors,[11] effective July 2, 1987.

/s/ James McAfee

JAMES MCAFEE
Associate Secretary of the Board

[SEAL]

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[11] Voting for this action: Chairman Volker and Governors Johnson, Seger, Angell and Kelley. Absent and not voting: Governor Heller.

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1354

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

MNC FINANCIAL, INC.,
Intervenor

Before: RUTH B. GINSBURG, SILBERMAN and BUCKLEY, *Circuit Judges*

ORDER

[Filed Dec. 2, 1988]

Upon consideration of petitioners' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX VI

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1354

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent

MNC FINANCIAL, INC.,
Intervenor

Before: WALD*, *Chief Judge*; ROBINSON*, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG* and SENTELLE, *Circuit Judges*

ORDER

[Filed Dec. 2, 1988]

Petitioners' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

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* Chief Judge Wald and Circuit Judges Robinson and D.H. Ginsburg did not participate in this order.

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A separate statement of Circuit Judge Silberman, in which Circuit Judge Ruth B. Ginsburg joins, is attached.

SILBERMAN, *Circuit Judge, with whom* RUTH B. GINSBURG, *Circuit Judge, joins, concurring in the denial of rehearing en banc*: Upon further review of the Bank Holding Company Act ("BHCA" or "Act"), we are even more convinced than we were when the panel opinion was issued that 12 U.S.C. § 1843 does not unambiguously yield the "perfectly clear" result petitioners suggest. Far from discerning the "explicit statement" that petitioners perceive in Congress' use of the phrase "the bank holding company" in section 4(c)(8)(D) of the Act, 12 U.S.C. § 1843(c)(8)(D), we believe a thorough reexamination of the Act indicates that petitioners' reading of the statute may not even be the more natural interpretation of Congress' language.

Petitioners' argument depends for its force almost entirely on the assumption that "*the* bank holding company" in section 4(c)(8)(D) must necessarily refer all the way back to the bank holding company referred to in section 4(a) ("No bank holding company . . ."), the latter of which is the putative acquiring bank holding company. Nevertheless, it is just as likely (perhaps more likely) strictly as a matter of word parsing that Congress intended it to refer only as far back as to the phrase "a bank holding company" [1] used in the opening passage of section 4(c)(8), which section speaks in terms of the acquired or target company. Of course, if that is so, then the premise of petitioners' construction evaporates since "the" actually equals "a". In short, we do not think there is any particular linguistic reason to read "the bank holding company" in 4(c)(8)(D) to refer to the *same* bank holding company referred to in 4(a).

Indeed, as the Board pointed out, in subsection D itself Congress used the term "*same* bank holding company" (emphasis added) when wishing to be more specific, and a close reading of that language casts doubt not only on

[1] Also referred to as "*any* company." 12 U.S.C. § 1843(c)(8).

whether petitioners' reading of the statute is *compelled*, but also on whether it is a reasonable construction at all. Subsection D limits the use of grandfather rights by restricting insurance sales to the state in which the bank holding company has its principal place of business (and adjoining states). Significantly, it provides that "new locations" must be those "of the *same* bank holding company . . . with respect to which insurance was sold" in 1982. That language surely implies on its face that nongrandfathered bank holding companies can merge with or acquire grandfathered bank holding companies without extinguishing grandfather rights.

Furthermore, if petitioners' reading of "the bank holding company" in subsection D were correct, it is unclear to us why Congress would have continued with the phrase "*or* any of its subsidiaries." That additional phrase suggests that a subsidiary can be grandfathered without conferring grandfather status on the parent bank holding company—which, of course, is inconsistent with petitioners' reasoning. The words could well have been designed to convey the notion that if a nongrandfathered bank holding company purchases either a grandfathered bank holding company or a grandfathered subsidiary and maintains either entity as its own subsidiary (which is what happened in both of the cases before us) such acquisitions are well within the plain language of Exemption D even if the bank holding company cannot independently qualify.

Were we to accept petitioners' approach toward the ascertainment of "plain meaning," a myopic focus on Congress' selection of a definite or indefinite article could occasion results that, at the very least, would be unexpected. For instance, Congress' use of "a" rather than "the" in Exemption G would require, presumably, reversal of the Board's construction of that provision as well. The Board has held that Exemption G rights, which are more extensive (and therefore more to be feared by the

petitioners), are *not* transferable. Yet, Exemption G provides:

> where the activity is performed, or shares of the company involved are owned, directly or indirectly, by *a* bank holding company which is registered with the Board of Governors of the Federal Reserve System and which, prior to January 1, 1971, was engaged, directly or indirectly, in insurance agency activities as a consequence of approval by the Board prior to January 1, 1971.

12 U.S.C. § 1843(c)(8)(G) (emphasis added). Thus, under petitioners' narrow, mechanical approach, Exemption G would not bear the Board's sound and eminently reasonable construction either.

The provisions of the Bank Holding Company Act with which we have wrestled are notoriously difficult to understand because the draftsmen at different times and in different clauses seemed to focus their attention alternatively and sometimes simultaneously on the initiating or acquiring company, on the one hand, and the acquired companies, on the other, without being careful to avoid confusion. Perhaps for that reason, Congress in section 4(c)(8) specifically provided the Board authority to "differentiate between activities commenced *de novo* and activities commenced by acquisition, in whole or in part, of a going concern." 12 U.S.C. § 1843(c)(8). While the Board has drawn a somewhat different distinction in the cases before us, this passage supports the Board's belief that when Congress wrote Exemption D they were focusing on the creation of grandfather rights and not really thinking about what would happen to those rights if the grandfathered company were acquired. If they had been, Congress arguably would have considered, among other things, the potentially different treatment to be accorded to commencement of insurance activities via acquisition and commencement via merger.

We agree with petitioners' account of the judiciary's role in reviewing agency constructions of statutory mandates; specifically, we fully recognize that the court's first step under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "is to try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987) (quoting *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987)). We are aware, however, of no canon of statutory interpretation that requires us to ignore the overall structure of a congressional scheme and instead occupy ourselves exclusively with only one of many relevant statutory passages. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *id.* at 1821-25 (Brennan, J., concurring and dissenting). Because our reexamination of both Exemption D and the broader reaches of the BHCA convinces us that the Act bears ambiguously on the issue before us, and because we continue to believe the Board's construction of the Act's confusing mandate is reasonable, we deny petitioners' request for rehearing and concur in the denial of rehearing *en banc*.